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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-153

POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, PEOPLE'S COUNSEL OF THE DISTRICT OF COLUMBIA, *Respondents.*

MEMORANDUM REPLY BRIEF OF PETITIONER POTOMAC ELECTRIC POWER COMPANY

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Washington, D.C.
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Petitioner, Potomac Electric Power Company (Pepco, Company), respectfully submits this memorandum reply to the Brief in Opposition of People's Counsel of the District of Columbia (People's Counsel), filed with the Court on September 29, 1979.

ARGUMENT IN REPLY

People's Counsel, in its Brief in Opposition, contends that the Public Service Commission's reliance upon 1974 test year data as being representative of the period that rates would be in effect produced a fair and reasonable result, and is not reviewable by the Court. Pepco contends that this reliance by the Commission upon only 1974 data—in disregard of actual and uncontroverted data in the record showing

operating results for the 12 months ended June 30, 1975 and demonstrating that the 1974 test year was neither representative nor relevant—was arbitrary and produced an "end result" which was confiscatory in effect, violative of the due process and just compensation clauses of the Fifth Amendment, and *guaranteed* that Pepco could have no opportunity to earn the authorized rate of return the Commission itself specifically found to be required to attract capital. *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602-3 (1944); *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968).[1]

People's Counsel's attempt to characterize this case as merely another challenge to the ratemaking formula applied by a regulatory agency totally misperceives the nature of Pepco's argument and overlooks the fact that, although a regulatory agency is not bound to the use of any single formula in setting rates, the "end result" of the final rate order must be reasonable. The Commission's final rate order failed completely in this regard.

Arbitrary regulatory action producing such an "end result", if repeated across the nation, is damaging to the essential national interest in a secure supply of

[1] People's Counsel's incidental assertion that the Commission could not have adopted the more current 1975 data without giving full procedural rights to all parties in the case is without merit. The 1975 financial data were introduced and received into evidence at the hearings before the full Commission without objection of any party. The 1975 data contained no new methodology but simply updated figures. Furthermore, People's Counsel, as well as every other party, had the opportunity for cross-examination even though the presentation of the new data did not reopen any issue already fully litigated during earlier stages of the proceeding.

electric energy.[2] The District of Columbia Court of Appeals' *en banc* affirmance of the Public Service Commission's decision constitutes a blueprint for continued confiscation of utility property in subsequent proceedings before the Commission.[3]

[2] Determination of the legal and constitutional sufficiency of the "end result" of regulatory action with respect to electric utility rates is a pivotal issue of national concern. The National Electric Reliability Council's 1979 Annual Review emphasizes the crucial importance of the issues presented to the Court in this case:

> "The overriding concerns of NERC at this time, however, are the discernible and disturbing trends which point to a future bulk (electric) power supply system which will be unable to maintain an adequate and reliable electric power supply for the United States—a requirement which NERC believes is essential to maintain a viable economy and to provide for the well-being of society.
>
> "The disturbing trends are the result of the tremendous uncertainties of the future and are the outgrowth of a number of developments over the past several years: rapid increases in the prices of all fuels; inflationary pressures which have escalated the cost of constructing new facilities; the proliferation of, and often conflicting, state and Federal regulations; the persistent opposition to the siting of any type of new generating unit and new transmission lines; and perhaps more importantly, no clear recognition by the public that an adequate supply of electricity is vital to the economic and personal well-being of people of the United States and Canada." (National Electric Reliability Council, 9th Annual Review (August, 1979), p. 3).

[3] Indeed, in Pepco's most recently-concluded rate case (Formal Case No. 685) the Public Service Commission refused to make use of any data more recent than calendar 1977, despite uncontroverted evidence covering 1978 and 1979 operating results and despite the fact that the case was pending before the Commission for *two years*, and was not finally decided until July, 1979. Again, the Commission's action has guaranteed that the Company will have no opportunity to come close to earning the return which it has specifically found reasonable. This unconstitutional end result will continue absent the application of the regulatory formula adopted by the Commission to more timely test year data.

Petitioner prays that this Court compel observance of the Constitutional safeguards against arbitrary and unreasonable regulatory action.

Respectfully submitted,

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